homa's choice of Michigan law to govern the nationwide class *solely because it facilitates the certification of a nationwide class* is entirely arbitrary. This form of arbitrariness, in which a different substantive law is applied based entirely on the plaintiffs' election of a forum (that itself has only a tenuous connection to the litigation), is squarely what *Shutts* forbids. *See Shutts*, 472 U.S. at 820 ("If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." (internal quotation marks omitted; alteration in original)); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

The nationwide scope of the class makes the choice of law all the more constitutionally indefensible. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-22 (2003). Respondents claim that *Campbell* in fact authorizes their nationwide class, because class certification makes all persons who would be affected by the resulting extraterritorial regulation parties to the action. Opp. 19. But respondents gloss over *Campbell*'s statement that "to those parties, the Utah courts, in the usual case, would need to apply *the laws of their relevant jurisdiction*." 538 U.S. at 421-22 (emphasis added). Nationwide class certification does not cure the constitutional defect addressed in *Campbell* unless the forum State applies an individualized choice of law analysis that respects "each State['s] . . . own reasoned judgment about what conduct is permitted or proscribed within its borders." *Id.* at 422.

II. The Judgment Below Is Final For Purposes Of This Court's Review

As the petition demonstrates—and as respondents tellingly do not rebut—this Court has jurisdiction at this stage of litigation when, as in this case, the basic authority of a state court to adjudicate specific claims between specific litigants is at issue. For example, the Court has granted certiorari to determine whether state courts possess the authority to adju-

dicate a dispute or instead are required to refer it to arbitration, lack personal jurisdiction to adjudicate claims against a defendant under the Due Process Clause, and lack authority to adjudicate a claim where federal law compels a change of venue. *See* Pet. 28 (citing cases). As those cases teach, this Court's review is appropriate where, as here, litigants would be subjected to "long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

The federal issues implicated by the decision below are deserving of immediate review because they are just as significant as the issues raised in these other cases, *if not more so*.[4] As with these other cases, reversal of the decision below on the federal question would be preclusive of further litigation on the specific causes of action at issue. *See* Pet. 28. Following a constitutionally adequate choice of law analysis, neither named respondent could maintain *any* cause of action under *Michigan* warranty law in the Oklahoma court; the claims at issue here would be terminated. *See id.* at 27.

Respondents' assertion that *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), precludes review is plainly incorrect. *Livesay* held only that class certification orders are not reviewable as of right in the federal courts of appeals under the collateral order doctrine that this Court applies pursuant to 28 U.S.C. § 1291. But this Court's collateral-order decisions are appropriately informed by the recognition that permitting such appeals as of right would result in the routine interruption of trial court proceedings for appellate review. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 429-30

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[4] Respondents' citation of *Florida v. Thomas*, 532 U.S. 774, 781 (2001), for the proposition that choice of law issues are "run-of-the-mine" is inapposite. *See id.* at 780 (concerning suppression of evidence in criminal trials, and not choice of law issues).

(1985).[5] No such consideration impedes this Court's exercise of jurisdiction here: Oklahoma already permits interlocutory appeal in cases like this, and despite the potential availability of further proceedings, this Court's "pragmatic approach" to finality questions under 28 U.S.C. § 1257 (*Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975)) clearly permits this Court to review the important federal issues that the Oklahoma courts have determined finally and adversely to DCC—as the cases amply demonstrate. *See* Pet. 28-29.[6]

Indeed, to the extent the federal model of finality is relevant here, this Court's "pragmatic approach" to finality questions under § 1257 suggests that this Court's promulgation of Federal Rule of Civil Procedure 23(f) in 1998 is far more relevant than its inapposite "collateral order" analysis in *Livesay* 26 years ago. With Rule 23(f), this Court recognized that certification of a large class creates enormous incentives to settle "even when the plaintiff's probability of success on the merits is slight" (*Blair v. Equifax Check Servs.*, 181 F.3d 832, 834 (7th Cir. 1999)), so that appellate review of an order granting class certification is often impossible if not permitted immediately. *See* FED. R. CIV. P. 23(f) advisory committee notes. Respondents are silent regarding this Court's practical recognition of this settlement reality.[7]

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[5] *Cf.* 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4008, at 148 (2d ed. 1996) ("[I]t is no longer possible, if ever it was, to treat [§ 1257 and § 1291] precedents as fungible.").

[6] Respondents also claim that the certification order is not "final" because the trial court could revisit it. Opp. 3. But the federal question has been finally decided: the ruling on the constitutional issues is now law of the case, and because DCC's Michigan headquarters was the entire premise for that ruling, no new evidence that might later be developed will reopen *that* question.

[7] Respondents posit that a nationwide class may someday reach this Court for review after a final judgment, but in all of re-

III. The Constitutional Issues Are Preserved

Respondents do not dispute that DCC properly preserved the argument that the Due Process Clause bars the nationwide class certification. Yet they assert that this Court "has no jurisdiction" to review the related Commerce Clause argument because, they claim, it was not separately preserved in the Oklahoma courts. Opp. 5. Respondents are wrong.

DCC specifically listed the Commerce Clause argument as one of the issues it would raise in the Supreme Court of Oklahoma, Pet. App. 88a-89a, and proceeded to do so in its Brief in Chief. DCC asserted that because the Commerce Clause (and the Due Process Clause) confers upon Congress, not the States, the power to regulate interstate commerce, the plaintiffs' attempt to use a nationwide class action to project one State's regulatory scheme onto the national economy was inappropriate. *See id.* at 99a-100a (citing *Healy*, the most apposite Commerce Clause case). Rather, respecting the congressional power over interstate commerce requires that nationwide claims of motor vehicle defects be resolved according to the structure Congress established, *i.e.*, through NHTSA. *See* Pet. 2. This is not a "policy argument," as respondents contend (Opp. 6), but a legal one, directly applying constitutional law to explain why the nationwide class was not a "superior form of adjudication" and should not have been certified. And the court passed on that argument, holding that "the needs of the interstate system" demand only a single nationwide *result* and that a nationwide class action can achieve that result. Pet. App. 13a-14a.[8] The Commerce Clause issue is properly before this Court.

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corded history they can find only a *single* nationwide class action (still on appeal) that was actually litigated to verdict—hardly sufficient to ensure review of the federal issues raised in this case.

[8] Seeking rehearing below, DCC repeated the Commerce Clause argument at length. Pet. for Reh'g 8-12. Respondents an-

In any event, respondents effectively concede—as they must—that DCC properly pressed a federal issue (due process) throughout the proceedings below, *see* Opp. 5; *see also* Pet. 4 n.2 (citing pleadings), and that the Oklahoma Supreme Court passed on that issue, Pet. App. 14a. Thus, there can be no doubt about this Court's *jurisdiction* to hear this case. Respondents' "jurisdictional" objection reduces to the novel notion that DCC somehow was required to invoke the restraints on extraterritorial regulation imposed by the Commerce Clause *separately* from those imposed by the Due Process Clause. But this Court's decisions do not support any such bright-line distinction; the two provisions closely intersect in this area. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) (imposing due process restraints on extraterritorial regulation and citing as authority Commerce Clause cases such as *Healy* and *Edgar v. MITE Corp.*); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (reviewing constitutional challenge to extraterritorial taxation under "[t]he Due Process and Commerce Clauses"); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (same, "[u]nder both the Due Process and the Commerce Clauses"); *cf. Boynton v. Virginia*, 364 U.S. 454, 457 (1960) ("closely related" claims are "considered within the scope of the issues presented to the State Supreme Court"). The petition accordingly raises both Clauses, and both are properly the subject of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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swered on the merits and never raised any "preservation" objection. *See* Resp. to Pet. for Reh'g 7-10. Their only procedural argument was that the decision was not final, Resp. to Mot. to Stay Mandate 2-5; the court stayed its mandate despite that contention.

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